TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 198

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE W. VARNELL.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 7, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between George W. Varnell, plaintiff, and the Washington and Georgetown Railroad Company, defendant, at law, No. 12629, a manifest error hath happened to the great damage of the said defendant as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 25th day of February, in the year of our Lord 1876, and of the Independence of the United States the 100th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To George W. Varnell, def't in error:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the Washington and Georgetown Railroad Company is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

1876, Feb'y 25. We hereby acknowledge service of the above citation & copy of writ of error.

T. T. CRITTENDEN,
Attorneys for Def't in Error.

(Indorsed:) 12629. George W. Varnell vs. Washington & Georgetown Railroad Co. Writ of error. Filed Feb. 25, 1876. R. J. Meigs, clerk.

2 In the supreme court of the District of Columbia, the 23 day of February, 1876.

GEORGE W. VARNELL
vs.
THE W. AND G. RAILROAD CO. } At law. No. . In error.

Know all men by these presents that we, the Washington & Georgetown Railroad Company, William R. Riley, and Henry Hunt, are bound

unto the above-named plaintiff, George W. Varnell, in the sum of six (6) thousand dollars, to be paid to the said George W. Varnell, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 23d day of February, 1876.

Whereas the above-named defendant, the Washington and Georgetown Railroad Co., hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named defendant, the W. & G. Railroad Co., shall prosecute its said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL OF R. R. CO.]
WASHINGTON & GEORGETOWN RAILROAD COMPANY.
HENRY HURT, *President.*
C. M. KOONES, *Sec'y.*
W'M R. RILEY. [SEAL.]
HENRY HURT. [SEAL.]

Sealed and delivered in presence of—
CHARLES C. GLOVER.
CHARLES A. WHITLOW.

Approved, Feb. 24, 1876.

MACARTHUR,
Justice.

3 In the supreme court of the District of Columbia, the 15th day of June, A. D. 1874.

GEORGE W. VARNELL, PLAINTIFF,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company, defendant. } At law. No. 12629.

Declaration.—Filed January 16, 1874.

The plaintiff sues the defendant, a body coporate, under and by virtue of an act of Congress of the United States, for that the plaintiff was a passenger on said railroad on the 30th day of October, A. D. 1873, and the plaintiff, in the act of getting off from one of the cars of said defendant on that day, was thrown from said car upon the ground by the carelessness and negligence of the defendant, and was thereby greatly injured, so that said plaintiff could not perform the usual duties of his employment, and was compelled to employ a physician at great expense, namely, in the sum of (250) two hundred and fifty dollars fo' his
4, 5 services, and the said plaintiff was confined to the house and suffered greatly from said injuries, and yet continues to suffer, and is permanently disabled from the performance of his usual employment and business, but said plaintiff did use due care in getting off said car.

That the plaintiff was a passenger on said railroad on the 30th day of October, A. D. 1873, and said plaintiff, while getting off from one of the cars of the said defendant, was by the negligence & carelessness of said

defendant in starting said car thrown from said car, and was thereby grieviously hurt and injured, and the defendant did not use due care in regard to starting said car, but the plaintiff did use due care in getting of' said car.

That the plaintiff was a passenger on said railroad on the 30th day of October, A. D. 1873, and the said plaintiff, although he used due care, was by the carelessness and negligence of the defendant severely injured, his thigh dislocated, and other injuries inflicted upon him so that he was confined to his bed for two months, and to his room for four months thereafter, and has suffered great bodily suffering and anguish and anxiety of mind; that he yet suffers greatly in his limb injured as aforesaid, and is obliged to have assistance to dress and undress himself, and to walk with the aid of a crutch or cane.

6

And the plaintiff says that he was badly injured and hurt, that he is entirely disabled from engaging in or prosecuting his usual business, which was that of keeping a meat and provision store, and has therefore discontinued his said store, and has lost the said business, and thereby has suffered great pecuniary loss; and he has been employed in an additional business at a salary of fifty dollars per month, and that by reason of said injury he has been rendered unable to perform the duties of it, and has been compelled to give up his situation, and in consequence of the aforesaid injury is rendered incapable of supporting himself and family, and the plaintiff claims ten thousand ($10,000) dollars besides costs.

T. T. CRITTENDEN,
G. W. COOPER,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof, otherwise judgment.

T. T. CRITTENDEN,
G. W. COOPER,
Attorneys for Plaintiff.

7

Summons.—Issued June 16, 1874.

In the supreme court of the District of Columbia, the 16th day of June, 1874.

GEORGE W. VARNELL, PLAINTIFF,
vs.
THE WASHINGTON AND GEORGETOWN RAILroad Company, defendant. } At law. No. 12629.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Carter, chief justice.

[SEAL OF COURT.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD, *Asst. Clerk.*

CRITTENDEN & COOPER.

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

8 *On back.*

Served copies of the declaration, notice to plead, and this summons on the defendant, S. L. Phillips, president of the company, the 16th day of June, 1874.

A. SHARP, *Marshal.*

Plea.—Filed June 29, 1874.

GEORGE W. VARNELL
vs.
THE WASHINGTON & GEORGETOWN RAILROAD Company, defendant. } At law. No. 12629.

The defendant says he is not guilty, as alleged.

ENOCH TOTTEN,
Attorney for Defendant.

Joinder of issue.—Filed July 7, 1876.

GEORGE W. VARNELL, PLAINTIFF,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD Company, defendant. } At law. No. 12629.

9 The plaintiff joins issue upon the defendant's plea.

ENOCH TOTTEN,
Attorney for Plaintiff.

Proceedings before the supreme court of the District of Columbia, holding a special term, and circuit court in and for said District, commencing the second Monday, 10th day of May, 1875.

MONDAY, *May* 10, 1875.

By order of D. C. Humphreys, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

THURSDAY, *June* 24, 1875.

Session resumed, pursuant to adjournment, Justice Humphreys presiding.

GEORGE W. VARNELL, PL'FF,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD Company, def't. } At law. No. 12629. Cal. 169.

10 Now comes here as well the plaintiff, by his attorneys, Mess'rs Crittenden and Cooper, as the defendant, by its attorney, M'r Totten, and a jury of good and lawful men of this District, to wit: George T. McGlue, John E. Morse, Jacob D. Hutton, John T. Johnson, Warren Dent, Charles Wilson, Reuben R. Brown, John Martin, Thomas

S. McNear, Addison Clayton, Charles H. Marshal, and Charles W. Dulin, who, being duly sworn to try the issue above joined, on their oath say they find the issue aforesaid in favor of the plaintiff, and assess his damages by reason of the premises at the sum of four thousand dollars, besides costs. Therefore it is considered that the plaintiff recover against the defendant four thousand dollars for his damages, as aforesaid assessed, and $39.85 for his costs of suit, and have execution thereof.

Motion for a new trial.—Filed June 25, 1876.

In the supreme court of the District of Columbia.

11 GEORGE W. VARNELL
vs.
W. & G. R. R. Co. } At law. No. 12629.

And now comes the said defendant and moves the court here to set aside the verdict in the above-entitled cause and grant a new trial, and for reason assigns the following, to wit:

1. Because the damages assessed by the jury are excessive.

ENOCH TOTTEN,
Att'y for Def't.

WEDNESDAY, *June* 30, 1875.

Session resumed, pursuant to adjournment, Justice Humphreys presiding.

GEORGE W. VARNELL, PL'FF,
vs.
WASHINGTON & GEORGETOWN RAILROAD Company, def't. } At law. No. 12629.

Now again come here, as well the plaintiff as the defendant, by
12 their respective attorneys, and thereupon the plaintiff relinquishes the sum of one thousand dollars from the verdict found and judgment entered in this case.

And thereupon the defendant's motion for a new trial is overruled.

WEDNESDAY, *July* 21, 1875.

Session resumed, pursuant to adjournment, Justice Humphreys presiding.

GEORGE W. VARNELL, PL'FF,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD Company, def't. } At law. No. 12629.

Now again comes here the defendant, by its said attorney, and tenders to the court here its bill of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record, now for then, which is done accordingly.

And thereupon the defendant moves the court for a new trial on exceptions.

13 In the supreme court of the District of Columbia.

GEORGE W. VARNELL
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } At law. No. 12,629.

Bill of exceptions.

On the trial of this cause the plaintiff, to maintain and prove the issues on his part, gave evidence to the jury tending to show that the plaintiff, on the 30th day of October, 1873, got on one of the cars (No. 13 or No. 33) of the defendant, in the city of Washington, on Pennsylvania avenue, between 13th and 14th streets, and paid his fare to the conductor and rode on said car to the city of Georgetown, to the intersection of High and Bridge streets, that point being the terminus of the route; that the car was stopped at the usual point for the passengers to alight; that several passengers got of' the said car, and that the plaintiff in proceeding to get of' the said car had stepped on the lower step of the car, at the rear end thereof, and was about stepping to the ground when the
14 car was suddenly started with a jerk and the plaintiff was thrown to the ground and struck the paved street on his left hip, and by the fall fractured the thigh-bone at the socket, and dislocated the same. That he was carried to his home where he was confined to his bed for several weeks, and that he has ever since been compelled to walk with the aid of a cane, and has been unable to perform any labor, and that the injured leg is now considerably shorter than the other one. That he had been employed before the injury by his son to attend a meat-stand occasionally, and that for such service he was accustomed to receive $50 per month, and that he also was engaged in the business of keeping a meat-store, in which business he cleared $30 per week. That he was 64 years of age at the time of the accident, and up to the time of the said accident had always been healthy, and that by said accident his said business was broken up.

The plaintiff thereupon rested his case, and the defendant, by its counsel, offered evidence tending to prove that the plaintiff was not on car No. 13 at the time of the accident, and that he had not been
15 on the said car during that time or near that time.

The defendant, further to prove the issues on its part, gave evidence to the jury tending to show that the plaintiff, just before the time of the accident, was standing upon the rear platform of the car, and that before the car had stopped jumped from the car, and in jumping fell and was injured, and that at the time of such accident the car had almost reached its usual stopping place, and that if plaintiff had waited a short time he could have alighted from the car in safety; and then the defendant rested.

The plaintiff was then recalled as a witness in his own behalf and for the purpose of contradicting the testimony of one of the witnesses called and examined by the defence, whose name was Reid, the said witness, Reid, having been previously cross-examined by defendant's counsel in reference to the subject-matter upon which it was desired to contradict him, and the plaintiff's counsel put the following question to him, to wit:

16 Will you state whether M'r Reid said to you in your presence that the car had stopped and you were about to get off?

(To which interrogatory the counsel for the plaintiff then and there ob-

jected, because the same was leading and improper; but the justice holding said court held that said interrogatory was proper, and that he would permit the answer thereto to be given to the jury, whereupon the defendant's counsel excepted, and the said exception was noted upon the minutes of the court.)

And thereupon the answer of the witness to said interrogatory was taken, which was, Yes, sir.

The plaintiff's counsel also called other witnesses to contradict the testimony of the said witness Reid, having previously cross-examined Reid in reference to the subject-matter upon which it was intended to contradict him, and the following interrogatories were put to the witnesses by the counsel for the plaintiff:

Q. State to the jury whether M'r Reid then said that the car had stopped and M'r Varnell was stepping out when it started again.

(To which the counsel for the plaintiff then and there objected,
17 and the objection was overruled by the justice holding the court, to which the counsel then and there excepted, and the exception was noted.)

Q. Did he state on that occasion that with himself as a witness he could gain the case without a lawyer?

Q. Did he state that his testimony would be worth a thousand dollars to W'm Varnell?

(To all of which questions the counsel for the defendant at the time of putting the same objected, because the same was leading and improper; but the justice holding said court ruled that said questions were proper, and the counsel for the defendant then and there excepted, and the exceptions was noted upon the minutes.)

And the witnesses thereupon answered the questions in the presence of the jury, the answer to the first question being "Yes, sir; he said that," and to the second question being "I do not think he said that, but I think he said that it would be worth something to him."

The counsel for the plaintiff, in order to contradict a statement made by the said witness Reid on cross-examination to the effect that
18 J. D. Varnell, a son of the plaintiff, had called upon him and in order to induce him to testify for the plaintiff had said to him that they could better afford to *to* pay for his testimony than could the railroad company, produced as a witness the said J. D. Varnell, and propounded to him the following interrogatory, to wit:

Q. Was anything said to you about his (Reid's) testimony that you could better afford to pay for his testimony than the railroad company?

(To which question the counsel for the defendant objected, because the same was leading and improper; but the justice holding said court held and decided that the said question was proper, and thereupon the counsel for the defendant excepted then and there, and the exception was noted upon the minutes.)

The answer of the witness to said question was thereupon taken and given to the jury, and said witness Varnell, in his said answer, denied the statements made by said witness Reid.

The testimony being closed, the justice holding said court instructed the jury:

19 "That the suit here is by a passenger on the Washington and Georgetown Railroad, and you have heard all the evidence in the case. There are but one or two questions of fact that you are to determine.

"You must first determine whether M'r Varnell, the plaintiff, was a passenger on the Washington and Georgetown Railroad. The conduc-

tor of car No. 13 says that he knew M'r Varnell and that he was not on his car. It appears, however, that he introduced a witness himself to show that he was on the car (that witness about whose testimony there is contra'ty, so far as the defendant is concerned); he having produced the witness himself, he cannot impeach the testimony of that witness, M'r Reid, but of course it might show a different state of facts, but it cannot impeach that witness. But the other party may. So that you are to determine, there being evidence tending on that point, but two propositions: One is, that M'r Varnell was on that 13 car, and if you come to the conclusion from the evidence that he was a passenger on that car, or on another one that was along about the same time, why, then,
20 that settles that part of the case. Then you must determine from the facts whether he fell off or got off, and was hurt in getting off. That is another fact. There is probably no dispute on either side on that subject, that off of one of those cars M'r Varnell was getting when he got hurt—fell from the car. Then the question is, whether he was at fault or whether the driver or the conductor of the company of that car was at fault, and that that fault caused the injury to the plaintiff. That you will have to determine from the evidence. It is a plain matter of fact, one way or the other, or rather it is a matter of fact that you have to determine whether or not it was the fault of the railroad company, or if it was the conductor or the driver who was at fault; of course, the company is bound for it. That you are to determine.

"There is no law that will complicate that matter; it is just a plain matter of fact. If you come to the conclusion that M'r Varnell acted himself in a neglectful manner in getting off, or that he was at fault, why of course he could not recover. But if you come to the
21 conclusion that it was the fault of the driver in starting to' soon, or in not observing properly, as he ought according to the facts in this case, why, if he did so, M'r Varnell was about to get off, and suddenly the car was started, and by its starting, before he had his foot upon solid ground, that occurrence took place, through the affirmative action or of the negative action of the road—it would be affirmative of course, if you find from the evidence that the driver started before M'r Varnell was on the ground, and that he fell, and probably there is no controversy where he fell from, whether he fell in the street of his own accord or fell from the car, there is no controversy about the fact that it was the fall that injured him. That you need have no trouble about. There is no contrari'ty about the evidence of the fact that he was in the street when he was injured, and that it was from the fall from somewhere, either of himself or out of the car, that caused the injury to him."

(To which instruction the counsel for the defendant then and there excepted, which exception was noted before the giving of the verdict.)

The justice holding the court thereupon further instructed the jury as follows:

22 "Now, the next question would be the extent of the injury. If you find, of course, that it was by the neglect of the road, then you would ascertain the extent of the injury to him, and you would do that from the evidence.

"You have heard what the physicians have said. He is not entirely disabled, as he seems in court in person. That the jury can see. But you remember the evidence of the experts, the physicians, as to the probability in this case, from all the evidences that are given, that his hip was not only dislocated but fractured, which would make it a more serious business than if it had been merely dislocated without the frac-

ure. Now, he is not entirely disabled; that is, not rendered entirely incompetent to do labor or work, or to use himself and his physical powers to some extent in aiding to support him. But if you find that it was from the neglect of the road that he was injured in the way in which these physicians state, then he has been materially injured, for which he would be entitled to compensation—damages as compensation."

23 (To which instruction the counsel for the defendant then and there excepted, and the said exception was noted upon the minutes of the justice.)

The justice holding said court thereupon further instructed the jury on this point:

"Gentlemen of the jury, look to the evidence. You look to the evidence of these two physicians to see whether or not from their evidence this man (and from your inspection of him in court combined) whether or not, if you find by connecting his present condition before you with the evidence of the other witnesses, of the physicians, and the other evidence in this case, that it was from this, if you find the fault on the part of the road, that it arose from their neglect, then you must determine from the evidence of those physicians whether or not he was materially injured.

"The law recognizes upon all subjects, all question', the propriety of examining experts. A mechanic, a house-builder, a carpenter would be called as an expert upon a subject or question pertaining to the wood part of the building. A brick-layer would be called upon the subject of brick-laying. A lawyer would be called as an expert upon the

24 subject of a suit between a lawyer and a client or anybody else as to the service of his fee. A surgeon or a practicing physician, or acting as a surgeon, would be called, and, in the absence of any other evidence convincing the mind of them that they were wrong, the jury would be bound to take their testimony upon the subject. And you are to determine whether this man has been materially injured or not."

(To which instruction the counsel for the defendant then and there excepted, which exception was noted upon the minutes of the said justice before the giving of the verdict.)

The said justice thereupon further instructed the jury:

"Now, if you come to the conclusion, gentlemen, from the evidence that the road was at fault, why your next inquiry is as to the measure of damages. Now, that the law controls, the court can instruct you as to the measure of damages, and beyond that you are not justified to go. You must remember that you cannot gainsay. You must confine

25 yourself provided you find damages. You must then confine yourself within the rules prescribed by law.

"The physicians attended that man for three months. You must gather from the evidence what the expense of that would be. Not only that, but he suffered in feeling. But you cannot go to excessive, vindicative, damages, on account of suffering from an accident or an occurrence that took place beyond what is reasonable by way of compensation.

"Now, we might say, the law would say, that so far as some things are concerned, some feeling, some agonies, that no man would take a kingdom and suffer. But that is not the way the law estimates. You cannot estimate it. You must estimate these things in some way in which you can get at them. You must get at them. You must find them in dollars and cents, for when a suit is brought for damages it means dollars and cents. It does not mean fancied ideas of suffering or agonies, but something compensatory. The physician's bills, his confine-

ment from his work and labor—he said that he was a laboring
26 man, making so much; you recollect what the evidence said—a month. He was out three months; that was in 1873, twenty months ago. It is more than that, probably, and he has been disabled totally for four or five months afterwards, and since in a way in which not entirely, not totally, not wholly, but to such an extent that you are to gather from the evidence to what degree, to what extent his labor would be interfered with by way of bringing him an income. Then you must reasonably now, if you come to the conclusion that the damages are to be assessed at all, you must come to a conclusion upon a monied consideration—dollars and cents.

"The former situation of the plaintiff, his present condition, and his incapacity after he is out of pain. So far as that point is concerned, as the evidence discloses, except probably two attendant consequences which may be slight, there is no evidence of any increase beyond the confinement for nearly four months; here is one question, now, about this evidence that you are to determine. You are to determine
27 from the evidence in the case the cross-examination of the witnesses for the defendant, and the cross-examination of the witnesses for the plaintiff, those young men and the officers who say that they went to the railroad and found this man, and then pursued and found the number of the car, &c., and put all this evidence together and see which of the witnesses you give credit to. I have no control over that point, except to state to you the principles of law. You must be controlled by the principles of law; and you are to give credit and weight to such of these witnesses as from their appearance before you, from their narrative, from the circumstances about which there is no contradiction (if there should be any circumstances about which there is no contradiction), why, then, you must take those circumstances as the basis from which you are to start. The narrative of the witnesses for the plaintiff, or the witnesses for the defense; what the witness, one of the men, a witness for the defense says he saw, you are to give to his testimony such credit as it is entitled to receive from all the evidence."

28 (And the counsel for the defendant thereupon excepted to the said instruction, which exception was noted upon the minutes of the said justice holding said court upon the giving of the verdict.)

The justice holding the said court further instructed the jury that:

"Of course, gentlemen, it is the duty of a jury, if they can, to reconcile the statements of all the witnesses rather than come to the conclusion that one witness has sworn deliberately falsely. You must reconcile the statements from the entire body of the evidence, running back, as I have said, taking as your basis all the circumstances attending this matter. Where contrari'ty and controversy arises, you are to dissect and look at the probability, and then, as the law says, you must take the manner of testifying of the witnesses, the examination-in-chief, and cross-examination, &c."

(To which instruction the counsel for the defendant then and there excepted, and said exception was noted before the giving of the verdict.)

29 After the justice had concluded his charge to the jury, the following occurred, to wit:

M'r TOTTEN. Your honor calls the attention of the jury to facts about which there is no contrari'ty of opinion. Your honor stated that it is not controverted here that he fell off.

The COURT. As there was evidence on that point to controvert it,

any controversy on that point, the jury would have to determine. If I did not say it, I say so now.

M'r TOTTEN. Your honor said, on one or two points, that there was no dispute about those.

The COURT. I have corrected that, so that it can be corrected in this part of the charge as put down. I said to the jury that as there was evidence by the conductor that Varnell was not on his car, No. 13, that they would have to find that fact.

M'r TOTTEN. There was another statement, your honor, in that connection. Your honor stated that our own witness said that it was car 13; I want to call your honor's attention to the fact that he said it was either 13 or 31, he did not know which.

30 The COURT. I stated to you very carefully, notwithstanding you cannot impeach your own witness, you might show another state of facts.

M'r TOTTEN. Your stated that our witness had said it was 13; I simply call your honor's attention to it that it may be corrected.

The COURT. The jury will have to correct that fact.

M'r TOTTEN. As to the injuries received by this man, your honor stated that he had been very materially injured; I except to that. I do not think that is a question of law to be given to the jury.

The COURT. I stated to the jury that the evidence of the experts, of the physicians, show that he was materially injured.

M'r TOTTEN. I think that is an erroneous charge.

The COURT. I will change that in this way: Gentlemen of the jury, look to the evidence of these two physicians to see whether or not from their evidence this man and your inspection of him in court com-

31 bined—whether or not, if you find by connecting his present condition before you with the evidence of the other witnesses, of the physicians, and the other evidence in this case, that it was from this, if you find the fault on the part of the road, that it arose from their neglect, then you must determine from the evidence of those physicians whether or not he is materially injured. The law recognizes upon all subjects, all questions, the propriety of examining experts. A mechanic, a house-builder, a carpenter in wood, would be called as an expert upon a subject or question pertaining to the wood part of the building. A brick-layer would be called as an expert upon the subject of brick-laying. A lawyer would be called as an expert upon the subject of a suit between a lawyer and a client, or anybody else, as to the service of this fee. A surgeon or a practicing physician, or acting as a surgeon, would be called, and, in the absence of any other evidence convincing the mind of the jury that they were wrong, the jury would be bound to take their testimony upon that subject. And you are to determine whether

32 this man has been materially injured or not.

M'r TOTTEN. Now your honor has done away with my objection; but there is still another one which has just fallen from your honor's lips, to which I desire to call attention. Your honor states to the jury they are to determine from this evidence and from the inspection of the plaintiff in court. That portion of it I object to. They have no right to pay any attention to the plaintiff and his condition as he appears before them.

The COURT. Connected with the evidence in the case is the charge.

M'r TOTTON. I object to that, your honor; I think that ought not to be.

The COURT. If you object, I will take out looking at the man. You are not to look at him.

M'r TOTTON. Nor determine, your honor.

The COURT. Nor determine. But you are to determine from the evidence in the case of these physicians, from what I have said to you as to the strength and power that the law recognizes in this evidence
33 in the absence of other evidence upon the subject. This jury, as sensible men, would be bound by the rules of the law to take the evidence, provided they believe the two witnesses, the two experts.

M'r TOTTON. Now, I want to call your honor's attention to one other thing which I think will be corrected on my bringing it to the attention of the court. Your honor told the jury that they must determine from the evidence what the expense of the physicians would be. If your honor will remember, there was not a word of testimony on the subject.

The COURT. If there was evidence by the physicians who attended him.

M'r TOTTEN. I have a prayer, your honor, that I will submit on that point. Your statement as to the length of time the plaintiff was confined to his bed. I think that ought to be left out of the charge to the jury, because it is a matter for them to determine from all the evidence.

The COURT. Of course it is; I will leave it so in the charge. I
34 leave in the charge that fact for the jury to gather from the evidence how long he was there. I stated that the witness said three or four months. If they find that not to be correct, they will give it for the time he was there. It was November, December, January, and February.

M'r TOTTEN. There is one other point, the credibility of witnesses.

The COURT. Which way they are to determine that?

M'r TOTTEN. The statement that your honor made I cannot remember, it has been so long ago.

(To all of which instructions the counsel for defendant then and there excepted, which exception was noted upon the minutes of said justice).

The counsel for the defendant thereupon prayed the justice holding said court to instruct the jury as follows, to wit:

"There being no testimony to show the amount of money if any expended by the plaintiff for the services of physicians and for other
35 expenses, the plaintiff is not entitled to recover anything for such services and expenses."

But the said justice refused to give the said instructions, but instructed the jury as follows, to wit:

The COURT. There being no evidence on the subject of the specific amount of the physicians' bill, you will not take that into consideration unless there is doubt.

M'r TOTTEN. And other expenses, your honor?

(To which refusal to give said instruction as well as to the instructions so given the counsel for the defendant then and there excepted, and the said exception was noted before the jury retired.)

The counsel for the defendant thereupon further prayed the court to instruct the jury as follows, to wit:

"The jury in estimating the damages of the plaintiff must take into consideration the advanced age of the plaintiff and its consequent infirmities as circumstances which would have lessened his capacity
36 for earning money."

But the said justice refused to give said instructions, and in lieu thereof instructed the jury as follows, to wit:

The COURT. The rules of law will justify you in ascertaining or in de-

termining the proper amount of damages according to reason. But, then, you cannot tell whether a man is going to live one year, two, or five You must be reasonable on that subject—damages—if you find damages at all.

M'r TOTTEN. I want an exception noted in regard to your honor's instructions in regard to the last prayer, the age, &c. The instruction which your honor gave in lieu of my second prayer, I am not prepared to say that your honor is not right, but I desire to reserve an exception.

The COURT. You can except to any part of it after you have read it.

M'r TOTTEN. With that understanding, I have nothing more to say.

37 And the said counsel requests said justice to sign and put his seal to this bill of exceptions containing said several matters and things and the said several opinions and instructions of the said justice, and the said justice (now for then) signs and puts his seal hereto this 21st day of July, 1875.

[SEAL.] D. C. HUMPHREYS.

Settled by counsel this 16th day of April, 1875.

ENOCH TOTTEN,
For Defendant.
CRITTENDEN & COOPER,
For Plaintiff.

Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing Monday, January 3, 1876. Present, Chief Justice Carter, and Justices Olin, Wylie, and MacArthur.

SATURDAY, *February* 19, 1876.

Session resumed pursuant to adjournment. Present, Chief Jus-
38 tice Carter, and Justices Olin, Wylie, Humphreys, and MacArthur.

GEORGE W. VARNELL, PLAINTIFF,
vs.
WASHINGTON & GEORGETOWN RAILROAD Company, defendant. } At law. No. 12629.

And now again come here, as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it seems to the court here that the defendant's exceptions to the rulings of the circuit court were not well taken, that there is no error in the proceedings or in the judgment of said court, therefore it is considered that the defendant's motion for a new trial be, and the same is hereby, overruled, and that the judgment of the said circuit court be, and the same is hereby, affirmed, and that the plaintiff recover against the defendant the costs of the case in this court, and have execution thereof.

No opinion filed.

39 CLERK'S OFFICE,
Supreme Court of the District of Columbia, ss:

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 12th day of September, A. D. 1876.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. J. CAMP,
Ass't Clerk.

(Indorsement on cover:) No. 198. The Washington & Georgetown Railroad Company, plaintiff in error, vs. George W. Varnell. District of Columbia sup. court. Filed 7th October, 1876.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.—No. 198.

The Washington & Georgetown Railroad Company,
Plaintiff in Error,

vs.

George W. Varnell, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ENOCH TOTTEN,
Counsel for Plaintiff in Error.

Joseph L. Pearson, Printer, 9th and D streets, Washington.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.—No. 198.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, Plaintiff in Error,
vs.
GEORGE W. VARNELL, Defendant in Error.

Brief for Plaintiff in Error.

This is a writ of error to the Supreme Court of the District of Columbia.

The defendant in error brought his action in the court below to recover the sum of $10,000 for personal injuries alleged to have been received by him on the 30th day of October, 1873, in the city of Washington, through the negligence of the servants of the Washington and Georgetown Railroad Company.

On the trial of the cause the plaintiff offered evidence tending to show that on that day he was a passenger on one of the cars of the defendants going from Washington to Georgetown, and that at the intersection of High and Bridge streets in the latter city, that point being the terminus of the route, the car was stopped to enable the passen-

gers to get off; that several passengers got off, and that he was proceeding to get off also, and had stepped down upon the lower step at the rear of the car, when the car was started with a jerk and he was thrown to the ground; that by the fall his thigh-bone, at the socket, was fractured and otherwise injured. That he was confined to his bed in consequence of these injuries, and that his injured leg was considerably shorter than the uninjured one, and that since the accident he has been unable to perform any labor.

The defendant gave evidence to the jury tending to show that the plaintiff, just before the time of the accident, was standing upon the rear platform of the car, and that before the car had stopped he jumped from the car and in jumping fell and was injured, and that at the time of such accident the car had almost reached its usual stopping place, and that if the plaintiff had waited a short time, he could have alighted from the car in safety; and then the defendant rested.

The court thereupon proceeded to instruct the jury as to the law applicable to the case, and upon these instructions the errors are assigned, as follows:

Assignment of Errors.

First. The court erroneously stated the law in the instructions set forth in the first three exceptions based upon the charge to the jury, in failing to give the defendant fully and fairly the benefit of its evidence as to the contributory negligence of the plaintiff.

Second. The court erred in instructing the jury as to the measure of damages.

Third. The court erred in refusing the two prayers for instructions presented by the counsel for the defendant, and erred also in the instructions given in lieu thereof.

Fourth. The instructions given by the court to the jury were, generally, incoherent, contradictory, and incomprehensible, and must necessarily have confused and misled the jury to the disadvantage of the defendant.

Argument and Authorities.

This action was based upon an injury to the plaintiff, caused by reason of the alleged carelessness of the defendant, and the defence was that those injuries were occasioned by the fault of the plaintiff himself, in attempting to get off a street car whilst it was in motion. The rule of law applicable to cases of this character has been thus laid down by this court:

"One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened."—(See Jones vs. B. & P. R. R. Co., 95 U. S., 439.)

The defendant was entitled to the protection afforded by this rule of law, and was entitled to demand that the deliberations of the jury should be confined within its limits. The instructions on this point are very extraordinary, and the principal part of them is set out in the very words of the court, to wit:

"There is probably no dispute on either side on that subject, that off of one of those cars Mr. Varnell was getting when he got hurt—fell from the car. Then the question is, whether he was at fault, or whether the driver or the conductor of the company, of that car, was at fault, and that that fault caused the injury to the plaintiff. That you will have to determine from the evidence. It is a plain matter of fact, one way or the other, or, rather, it is a matter of fact that you have to determine whether or not it was the fault of the railroad company, or, if it was the conductor or the driver who was at fault, of course the company is bound for it. That you are to determine. There

is no law that will complicate that matter; it is just a plain matter of fact. If you come to the conclusion that Mr. Varnell acted himself in a neglectful manner in getting off, or that he was at fault, why, of course, he could not recover. But, if you come to the conclusion that it was the fault of the driver in starting too soon, or in not observing properly, as he ought according to the facts in this case, why, if he did so, Mr. Varnell was about to get off and suddenly the car was started, and, by its starting, before he had his foot upon solid ground, that occurrence took place, through the affirmative action or of the negative action of the road—it would be affirmative, of course, if you find from the evidence that the driver started before Mr. Varnell was on the ground, and that he fell; and, probably, there is no controversy where he fell from, whether he fell in the street of his own accord, or fell from the car. There is no controversy about the fact that it was the fall that injured him. That you need have no trouble about. There is no contrariety about the evidence of the fact that he was in the street when he was injured, and that it was the fall from somewhere, either of himself or out of the car that caused the injury to him."—(8.)

At the beginning of this instruction the jury is told that it must determine whether the plaintiff was at fault, or whether the agent of the defendant was at fault or whether "*that* fault caused the injury to the plaintiff;" the word "that" must have related to the "fault" of the agents of the company; if this be the true interpretation of the language used, then the jury was directed to consider of the fault of the company only, in connection with the injury complained of in the declaration. But immediately afterwards the proposition is placed before the jury in an unmistakable light; the jury was told that the question to be determined was "whether or not it was the fault of the railroad company, or if it was the conductor or the driver who was at fault; *of course, the company is bound for it.*" From this the jury was to understand that if the agents of the company were at fault the company was "bound for it" in any event. Not satisfied with this venture the court gathered fresh courage and started off again on the same

subject, and then told the jury that if the plaintiff himself "acted in a neglectful manner in getting off, or that he was at fault," he could not recover. "But," continued the court, "if you come to the conclusion that it was the fault of the *driver* in starting too soon, or in not observing properly, as he ought according to the facts in this case, why, if he did so"——this sentence was never completed by the court. But the plain inference which the jury was expected to draw from it was that if they should find from the evidence that the driver of the car was at fault either "in starting too soon, or in not *observing properly* as he ought," then the plaintiff was entitled to recover.

Whether or not the driver of the car exercised due diligence in the discharge of his duty was a question of fact, and it should have been submitted to the jury. But the court excluded it entirely from the consideration of the jury and decided it as a question of law. The jury was told that the driver "ought, according to the facts in this case," to have "observed properly." The jury could not have been told more plainly that the driver *was* at fault, and thus the court, as matter of law, settled the question of the defendant's negligence against the defendant.

It is deemed not improper to suggest here the inquiry as to what obligation rests upon the *driver* of a street car to "observe" passengers? It is his duty to obey the signals given to him by the conductor of the car and to devote his attention to his horses and those signals only. His opportunities, too, for noting the movements of passengers are very limited; he cannot see the passengers on the rear step or platform. But at all events it was not a question of law for the court to pass upon, and it was error so to do.

It is also submitted that the strange confusion of words in the last part of the instruction contained in this exception must necessarily have misled the jury to the injury of the defendant.

In that part of the instruction given by the court to the jury, which is set out in the second exception to the charge,

(8,) the court, after commenting upon the character and extent of the injury, tells the jury that if the plaintiff was injured in consequence of "the neglect of the road," then the injury was "material," and that the plaintiff was entitled to recover damages. Here there is no reservation for the defendant's protection. The question as to the negligence of the defendant is submitted to the jury without reference to the alleged concurring fault of the plaintiff. Inasmuch as the defence rested upon the proof of want of ordinary care and caution on the part of the defendant, such a charge from the court, however artistically or inartistically presented, was clearly erroneous. The same remarks apply to the instructions in the third exception, (9,) arising upon the charge to the jury. These instructions present the same error. The court makes the liability of the company depend solely upon the question as to whether or not the injury resulted from "the fault of the road."—(9.) No inquiry is directed as to whether or not there was any concurring negligence of the plaintiff. In the effort of the court further on, (11,) to correct some of the preceding errors on the trial, this defect is adhered to with apparent tenacity. The question of the fault of the company is still kept before the mind of the jury as the important subject of inquiry, without the slightest allusion to the asserted contributory negligence of the plaintiff.

The next error relates to the instructions of the court upon the subject of damages. When this question was presented for discussion, the court, to continue before the mind of the jury distinctly the charge of negligence against the company, begins by telling the jury that if they should come to the conclusion "that the road was at fault," the next inquiry for their investigation was the question of damages. It is objected to this charge that it rendered the company liable for the injury, in any event, if its servants were found to be at fault, without regard to the concurring fault of the plaintiff. After thus preparing the way for the question of damages, the court starts off abruptly by flatly

deciding a question of fact. The court declared at the outset that "the physicians attended that man for three months." The record does not show this fact. The jury was also told from the bench, that the evidence shows that his confinement was "a month;" the record shows that he was confined for "several weeks." Immediately afterwards the court declared the fact to be and decided for the jury that the plaintiff was confined "for nearly four months." The court also undertook to decide the question of fact as to the degree of injury; the jury was instructed that the plaintiff had been "disabled totally for four or five months afterwards," that is, after "he was out three months;" that since that time he was not wholly disabled. Then the court left it to the jury to take up the matter at that point, and determine the extent of the damages arising after the end of the four or five months of total disability. Now, the record states that after the accident the plaintiff "was carried to his home where he was confined to his bed for several weeks, and that he has ever since been compelled to walk with the aid of a cane, and has been unable to perform any labor," and this is all it shows on this branch of the case.

Further enlightening the jury on the question of the measure of damages, the court told the jury (9) that they must gather from the evidence what would be "the expense" of the attendance of the physician, and what the amount of the "physician's bill" was. When the attention of the court was directed to the fact (12) that no evidence whatever had been offered to show that there had been a physician's bill incurred, and a prayer was requestod excluding the matter of expenses for physicians from the consideration of the jury, the prayer was denied, and the jury was informed that they should not take those expenses into consideration "unless there is doubt!" This was neither allowable nor just, inasmuch as a jury is always ready and willing to be possessed of doubts as against corporations, and especially railroad corporations.

The prayer (12) presented by the defendant's counsel, based upon the evidence as to the age of the plaintiff, should

have been granted, and it was error to refuse it; it was still a greater error to instruct the jury on this point as it was instructed by the court.

The judgment of the Supreme Court of the District of Columbia ought to be reversed and the cause remanded for a new trial.

ENOCH TOTTEN,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

MARCH, 1879.

THE WASHINGTON AND GEORGETOWN R. R. Co., Plaintiff in Error,
vs.
GEORGE W. VARNELL, Defendant in Error.
No. 198.

The record shows that George W. Varnell, defendant in error, obtained a verdict in the Supreme Court of the District of Columbia against the plaintiff in error, the Washington and Georgetown R. R. Co., for four thousand (4,000) dollars for injuries sustained October 30, 1873, by reason of the negligence of employés of said railroad. That of said verdict the defendant in error remitted one thousand (1,000) dollars, judgment for three thousand (3,000) dollars being entered; and this judgment, affirmed by the Supreme Court of said District in banc, is here for review upon exceptions taken by plaintiff in error.

These exceptions are twofold:

1. To the overruling of objections made by plaintiff in error to the form of certain questions put by defendant in error to witnesses called by the latter to contradict a witness of the former as to what he (the witness) had stated upon previous occasions, he having denied using certain expressions.

2. To the instructions of the court.

Of the first class, five exceptions were taken, (Record, folios 16, 17, 18), in each of which the reason alleged is

that, although the ground for contradiction was properly laid, yet said questions were leading, and therefore inadmissible.

In support of said questions the defendant in error says that this form of contradicting and discrediting a witness is usual and regular, and that any other mode would be irregular and objectionable.

"The witness called to contradict may be asked as to the particular words read from the brief."

Starkie Ev., 243.

Hallet *v.* Cousens, 2 M. & Rob., 238.

Edmunds *v.* Walter, 3 Starkie C. (3 C. L. R.) 8.

"Counsel are sometimes permitted to ask a witness called to contradict whether the particular expressions were used instead of asking the witness what was said."

Greenleaf Ev., 477.

"It is usual to ask such witness whether the particular expression was used or the thing was said, without putting the question in the general form by inquiring what was said. If this were not allowed it is obvious that much irrelevant and inadmissible matter would frequently be detailed by the witness."

Starkie Ev., 170.

"The direct question is not only in such cases admissible, but often absolutely necessary to develop the language used." Ib.

The practice, the established precedents, the reasons for the practice as given, with others which recognize this mode as a necessity for developing the truth, we submit are sufficient to justify the allowance of said questions. Further, a reference to these questions will show that the *first* and the *second*, folio 16, go to the credit of Reid, witness for the plaintiff in error, and were therefore admissible under above authorities. To the *third*, folio 17,

no reply is given; to the fourth the answer is not categorical or affirmative; and the *fifth*, folio 18, has no relevancy to (what the Record states) was its object.

But whether said questions were admissible or not, or immaterial or not, the manner of such examination is a matter within the discretion of the court, and its exercise is not matter of exception.

"The admission of leading questions is within the discretion of the court, and if improper questions are admitted it is not subject of error."

Starkie Ev., 172 and note.
Donnell *v.* Jones, 13 Ala., 490.
Yarborough *v.* Moss, 9 Ala., 382.
Sears *v.* Shafer, 1 Barb. S. C., 408.
People *v.* Lohman, 2 S. C., 216.
Budle *v.* Van Nostrand, 24 S. C., 25, *et al.*

"Indeed, when and under what circumstances a leading question may be put is a matter resting in the sound discretion of the court, and is not a matter which can be assigned for error."

Greenleaf Ev., 477.
Walker *v.* Dunspaugh, 20 N. Y. (6 Smith) 170.
R. *v.* Murphy, 8 C. & P., 306.
Boston *v.* Caren Ry. & Moo., 127.
R. *v.* Chapman, 8 C. & P., 558.
2 Phillips Ev., 891.

"The decision of a court on a matter within its discretion is not a subject of writ of error or bill of exceptions."

3 Wall., 320; 3 Hill, 159; 4 Hill, 119; 2 H., 263; 13 H., 212; 16 H., 214.

Exceptions to instructions of the Court.

During the delivery of instructions to the jury *five* exceptions were taken, viz: *First*, (fol. 21,) is a general ex-

ception to the first portion of the charge, but no particular language or expression is specified, and it is too wide in its scope to admit of or require answer. "The court cannot take notice of any matter that is not specifically stated as ground of exception." 1 Wen., 418; 1 Hill, 91, *et al.* The *second*, (fol. 23,) is to the expression "if you find, &c., then he has been materially injured;" but this language was withdrawn, and the jury were directed to determine from the testimony of the physicians whether or not he was materially injured. (fol. 31.) The allusion to plaintiff's appearance in court, (fol. 23,) was withdrawn, and the jury instructed "not to look at him." (fol. 32.) The *third*, (fol. 24,) as to weight to be given to testimony of physicians, is not well taken, the law as set forth in the charge being that of the authorities.

Greanleaf Ev., 440, *et al.*

The *fourth* (f. 28) is general to all instructions on fs. 25, 26, and 27, and is, therefore, too widé in its scope to admit of or require a reply, if there was anything objectionable, which we deny.

"The point and object of an exception must be specified."

23 Wend., 316.

The *fifth* (f. 28) is not well taken, as the language of the court as to the duty of the jury, is supported by—

2 Greenleaf on Ev., 160 *et al.*

Starkie Ev., 822, 866 *et al.*

But whether well taken or not, the charge and all the above exceptions are again referred to and included by the plaintiff in error in his subsequent specific requests to the court for correction, as after the delivery of the charge he called the attention of the court to and specified what particular language he excepted to, and the court thereupon withdrew or changed the portions so excepted to.

e. g. First request (f. 29) as to expression "probably no dispute that plaintiff fell off" (f. 21), the court withdrew it and left that fact to the jury to determine. (f. 29).

Second. "Probably no dispute that off one of these cars he fell;" this on request (f. 29) was also withdrawn and the jury directed to determine this (fs. 29 and 30). But neither of the above expressions were positive or declaratory in form, nor assumed the province of the jury; and "exception does not lie for comments made by the court on the testimony."

People *v.* White, 14 Wend., 111.

Third (f. 30). "That witness of defendant had said the car was No. 13." (f. 19). On request this was changed and the jury was instructed to correct that fact if the court had misquoted the witness. (See f. 30.)

Fourth (f. 30). "If the jury believe the physicians, then the plaintiff has been materially injured." (f. 22.) This also was withdrawn and the jury directed to determine that from the testimony of the physicians (f. 31) and the court had also previously (f. 24) instructed that "they should determine whether this man was materially injured." (f. 24.)

Fifth. "The jury to judge, &c., and from plaintiffs appearance in court" (f. 23), this was withdrawn on request and the jury were directed "not to look at the plaintiff," (f. 32) "nor determine" the extent of the injury, except on the "testimony of the experts." (f. 33.)

Sixth. As to expense of medical attendance, no evidence of specific expense being submitted. The jury were directed to determine this from the evidence "if there was evidence of expense." (f. 33.)

Seventh. As to the time plaintiff was confined (f. 26), the court replied, "of course it" (meaning the question of

time) "is for the jury to determine;" "I leave it in the charge for the jury to gather from the evidence how long he was there." (f. 34) This withdrew anything objectionable, if any existed, and the subsequent reference to the months witness had said he was confined, was understood as such a reference, and therefore was not material. But whether material or not, no exception was taken thereto. "Exception must be actually taken to the language at the time, otherwise it will be deemed abandoned."

Scott *v.* Lloyd, 9 Pet., 419.

Eighth. A general exception (f. 34) is attempted to be reserved to all the instructions, but this the defendant in error holds to be irregular and void. "A general exception must be overruled if in the series of propositions in the charge excepted to in mass, any one proposition be sound"

1 Black, 209; 2 Wall., 328; 1 Wall., 645, *et al.*

"A general exception will not be regarded even in criminal cases."

15 Wen., 581.

Prayers Refused.

To have granted the first prayer (f. 35) without qualification, would have been error. The declaration (f. 1) sets forth the expense of medical attendance; the testimony (quoted by the court, f. 34,) had shown medical attendance for several months; the prayer of the plaintiff in error itself concedes the fact. Medical attendance having been shown or admitted it was presumptively an expense, it was an inference of fact to be drawn by the jury whether or not medical attendance involved expense. "An inference of fact, the jury can, of their own knowledge and experience, determine without aid from the court."

Starkie Ev., 768, 773, &c.

"An instruction which takes from the jury the right of weighing the evidence is erroneous."

Greenleaf *v.* Birth, 9 Pet., 292, p. 5.

Ches. & Ohio Canal *v.* Knapp, 9 Pet., 541.

"It is the peculiar province of the jury to draw the proper conclusion in fact from mere circumstantial evidence of the fact, and to deduce the proper inference in all cases of indirect evidence, except in those instances where the law makes particular facts the foundation of legal presumptions; and even in such instances where the legal presumption is not conclusive, it is still for the jury to decide on the evidence, whether the legal *prima facie* presumption or intendment is repelled by contrary evidence."

Starkie Ev., 788.

2. The second prayer (f. 35) was another attempt to induce the court to invade the province of the jury. The age of the plaintiff being admitted, his ability or inability to earn money was also an inference of fact for the jury; and the above authorities justify the rejection of this prayer also.

"Refusal to charge on a disputed question of fact is not error."

3 Cr., 391.

4 Cr., 62.

6 Pet., 598.

"To refuse that instruction which involves an opinion on matter of fact, is not error."

U. S. *v.* Barnham, 1 Mas., 57.

"The court is not bound to instruct the jury that they can draw certain inferences from the evidence."

U. S. *v.* Jones, 8 Pet., 399.

Therefore, the court is not bound to instruct the jury that they can draw a certain inference from the absence of a particular kind of evidence.

But the evidence had shown that Mr. Varnell conducted a business by which he made thirty (30) dollars per month; also, that, outside of this, he earned fifty (50) dollars per month (f. 14), and these facts show his capacity to earn money; *they* were stronger than inferences based upon age, and were proper facts for consideration of the jury, as well as his age, when they were considering his capacity to earn money. If, therefore, said prayer was in part proper, it was defective in form and in substance.

"If a prayer for instructions be not correct in its very terms, it is not error to refuse it."

V. *v* P., 5 Cr., 142.
B. *v*. M., 11 Wheat., 78.
W. *v*. P., 9 Pet., 663.
U. S. *v*. Bank Met., 15 Pet., 378, *et al.*

It will be observed that the prayer given in lieu, was, on the whole, against the interests of the defendant in error, as the reference to a man's possible life (meaning the defendant in error) or expectation being "one, two, or five years," was too restricted and too limited, as applied to defendant in error, who, according to mortuary tables, had then (age 64 years) an expectation of eleven and a half years, unless, indeed, the court may have had in view the then condition of the defendant in error, and evident fact, viz: that his life had, according to the evidence, been materially shortened by the act of the plaintiff in error. But, whatever the cause, this instruction was unfavorable to Mr. Varnell, and, in addition, the jury was cautioned and directed to "be reasonable on that subject, if they found damages at all" (f. 36), the same caution having been previously given. (f. 26.) The instruction, was, therefore, favorable to the plaintiff in

error, if to any one. He was not prejudiced by it, and the court had the right to determine its form.

Again, these prayers, if given in terms, could have affected only the amount of damages, but by the remittitur of $1,000, a reduction was made by defendant in error greater than plaintiff in error could have obtained, or have been entitled to had his prayers been granted in their exact language.

"In examining the charge for the purpose of ascertaining its correctness, the whole scope and bearing of it must be taken together."

Magniac *v.* Thompson, 7 Pet., 348.

While we admit that the charge of the court in one or two instances may be somewhat awkward in expression; we submit that the exceptions are trivial and not well taken.

The instructions, taken altogether, are certainly just to the plaintiff in error, and the judgment being but three-fourths the amount of the verdict is as small as could be expected.

A review of the record will show that only substantial justice has been done. The defendant in error, October 30, 1873, then aged 64 years, was permanently disabled by dislocation and fracture of his thigh; it may also be gathered from the record that the case was one of peculiar aggravation—gross negligence on the part of the plaintiff in error.

Mr. Varnell has been kept out of his just compensation for nearly six years, and is now 70 years of age, should he be remanded to pursue another long and uncertain course of litigation—it is the end of his hope of ever getting compensation.

T. T. CRITTENDEN,
GLEN W. COOPER,
Of Counsel.